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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 231

BILL HATAHLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 220 F. 2d 666 (Pet. App. 25-35). The oral opinion of the district court and its findings of fact and conclusions of law appear at R. 400-405 and R. 19-49, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1955 (Pet. App. 35). A petition for rehearing was denied on April 15, 1955

(Pet. App. 36), and the petition for a writ of certiorari was filed July 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act because its agents instigated and participated in, the enforcement on the federal range of a Utah statute for the elimination of abandoned horses which resulted in the confiscation of horses and burros claimed by the Indian petitioners.

STATUTE INVOLVED

The pertinent provisions of 5 Utah Code Annotated, 1953, Title 47, Chapter 2;[1] of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269, as amended, 43 U.S.C. 315, *et seq.;* and the Federal Range Code, 43 C.F.R. 161.1, *et seq.*, are printed at pages 19-24 of Petitioners' Appendix. In addition, Section 16 of the Taylor Grazing Act, *supra,* provides:

> *Sec. 16* [43 U.S.C. 315n]. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted

[1] This is the same as Title 64, Chapter 2, Utah Code Annotated, 1943, which was in force during the period of the action in controversy.

as regards public health or public welfare, shall at all times be in full force and effect: *Provided, however*, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

STATEMENT

Petitioners, Navajo Indians, instituted this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover $100,000 as damages for the loss of 116 horses and 38 burros which, they alleged, were owned by them and were taken unlawfully from the federal range in Utah and killed or sold by agents of the Bureau of Land Management, Department of the Interior (R. 6-8, 278). The area involved is public domain administered as part of Utah Grazing District No. 6 under the Taylor Grazing Act (R. 20-21). It is in the southeast corner of the State of Utah and directly north of the Navajo Indian Reservation (R. 21).

On or about July 1, 1952, the Range Manager of this district, upon reports from his assistants that there were many abandoned horses on the range, decided to conduct a round-up and elimination of such horses in accordance with the usual practice under the provisions of Title 64, Chapter 2, Sections 1-6, Utah Code Annotated, 1943 (R. 107, 129, 140, 328-329).[2] He secured the approval of the members of the Board of Commissioners of

[2] At the same time he instituted an identical program in Grand County, Utah, which is Grazing District No. 9, also under his supervision, and far to the north of this area (R. 328-329).

San Juan County, Utah (R. 32-34, 45, 152-157, 349, 366, 373, 375-376, 402), and, commencing on July 10, 1952, posted and published the notices required by the Utah statute (R. 32-33, 90-91, 97, 107, 122-123, 302-303). The notices announced that the elimination drive would commence on August 10, 1952, and stated that "All owners of horses running upon the open range are hereby given notice to file with the Board of County Commissioners within (30) days from the date given below [July 10, 1952], a description of such horses and the brands and marks thereon" (R. 32-33).

Commencing on September 19, 1952, instead of on August 10, 1952, as announced, and continuing periodically up to the date of the filing of this action on March 20, 1953, the agents of the Bureau of Land Management, the local sheriffs, and white livestock permittees rounded up the horses and burros involved here and a few others (R. 8, 31, 36, 85, 93-94, 130, 344). The animals were herded together on the range, loaded into trucks and hauled to corrals where they were kept for periods up to two weeks (R. 142, 143). Nine animals were shot on the range in the gathering process because they were feeble or injured (R. 100, 135, 293, 297). Fifteen of the horses were sold locally (R. 150, 327-328). Several were redeemed by Indians (R. 94, 150, 296). A few were returned to white men (R. 99, 126-127, 149). The rest were transported out of the area and sold to a packing company near Provo, Utah (R. 103, 146-151, 291-293). Petitioners then instituted this suit.

The district court held that the United States was liable and awarded petitioners the $100,000 sought by them, as damages for loss of the animals, consequential damages and mental pain and suffering (R. 40-43, 47-49). The reasons stated for the court's decision were (1) that the round-up of these horses was willful, wanton and malicious and part of a plan to drive petitioners from the range; (2) that, because the Taylor Grazing Act and the Range Code issued thereunder had provisions for dealing with owners of trespassing livestock, the Utah statute relative to the elimination of abandoned horses was not applicable; and (3) that, even if the Utah statute were applicable, its provisions were not followed, because the court believed (a) the Board of County Commissioners did not officially authorize the program, (b) the Advisory Board [3] which was named by the Commissioners to direct the program did not officially accept the responsibility until October 9, 1952, after a number of horses had already been taken, (c) the horses were not abandoned within the meaning of the Utah statute, and (d) no effort was made to return them (R. 43-49). In addition, it enjoined the United States from further interference with petitioners or disposal of any of the

[3] The Taylor Grazing Act provides for the appointment by the Secretary of the Interior, from among the permittees, of a group of local stockmen, known as an Advisory Board, the functions of which are to offer suggestions and advice to the Government as to which applicants should be granted permits, and, in general, to advise in the management of the grazing district from which they are elected (R. 21). 43 U.S.C. 315 o-1.

public lands involved and reserved jurisdiction to try petitioners' claim to property rights in the area (R. 49-51).

On appeal by the United States, the court of appeals reversed. It held that the provisions of the Taylor Grazing Act did not preclude, but authorized, use of local police statutes and that the provisions of the Utah statute were followed (Pet. App. 25-35). Consequently the court did not discuss numerous other legal objections which the Government had to the judgment (see R. 1-5).

ARGUMENT

The limited issue here, as the court of appeals held, is whether the Utah statute, which provides for the removal from the open range and destruction of abandoned horses, was correctly invoked and followed in this instance on the federal range. Other issues framed by petitioners, as presenting important federal or constitutional questions, based on petitioners' claim of "ancestral homes on the federal range," on the wisdom of the Interior Department's handling of its affairs, and on alleged motives of agents of the Government are not material to the decision and, in audition, are without merit.

There has been no deprivation of property without compliance with statutory requirements (Pet. 10-11). The provisions of Sections 3 and 5 of the Taylor Grazing Act, Pet. App. 19-20, and the provisions of the Federal Range Code, 43 C.F.R. 161.6(a), 161.2(n), that preference shall be given in

the issuance of grazing permits to "bona fide occupants" of the federal range and free permits shall be given for "livestock kept for domestic purposes" which are valid "in the immediate neighborhood of the residence of the licensee" are not applicable to those who are occupants under claims of rights denied by the Government or to horses used to herd cattle and sheep over a large area of the range for other than domestic uses. The fact that petitioners were given permits for a time in the past is not significant. For many years prior to the action complained of here, they were repeatedly told to leave the area for the reservation and were denied permits (R. 21, 30). The footnote in the petition for certiorari (fn. 7, p. 11) is the first suggestion in this case that under these provisions the Department of the Interior was under a mandatory duty to issue permits to petitioners.

The provision of the Federal Range Code, 43 C.F.R. 161.11 (Pet. App. 20-21), requiring service of written notice to a violator of the prohibition in the Taylor Grazing Act against the unlawful grazing of livestock is not applicable to the facts here[4] (Pet. 11-13, 20-21). As the court of appeals correctly held, that provision relates to violations by

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[4] The action of *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C.A. 10), was instituted under this provision of the Range Code to enjoin the unauthorized herding and grazing of large numbers of cattle and sheep. It was appropriately dismissed when an investigation, requested by the Bureau of Land Management officials in Salt Lake City, showed that the Indians "have returned to the Reservation and that there are no more trespassers" (R. 30, 125-126).

known owners and "makes no reference to and has no application whatsoever to a program for the elimination of abandoned stock on the federal range" (Pet. App. 31). Contrary to petitioners' assertions (Pet. 12), the owners of the animals involved here were not known in the sense specified by the Range Code which dealt with service of written notice "in person or by registered mail" upon a named violator setting forth "the act or acts constituting such violation" (Pet. App. 20). The district court found that the employees of the Government knew that the horses "belonged to plaintiffs or to some of them" (R. 38). As that finding indicates and as the court of appeals noted, the most which the evidence supports is that "It was generally known to those who were rounding up the animals that they belonged to Indians * * *" (Pet. App. 29; R. 92, 108-109, 130-131, 292-296, 326-327, 336, 338, 378). Some of petitioners did not know at the time to whom the horses belonged (R. 148, 296, 305). Petitioners offered no records to sustain their assertion that the animals bore recorded brands (Pet. App. 29). A search of the records by government employees showed that no brands were registered (R. 152, 291-295, 305-306, 327). Petitioners' insistence that the written notice provisions of the federal regulations are applicable here would render elimination from the federal range of abandoned animals difficult if not impossible as a practical matter.

As the court of appeals held, the Utah police statute is applicable to the federal range. Indeed,

it has been invoked on the federal range often and over a long period of time, both before and since the enactment of the Taylor Grazing Act (R. 85, 107, 114, 129, 140, 328-329, 390-391). The items raised by petitioners to challenge its use and the method of its use in this instance are not valid. The area of public lands involved here is desert (R. 21, 26). Forage is sparse (R. 21, 28, 38). A serious drouth existed (R. 116, 190). The number of horses on the range had increased to hundreds and horses tend to ruin the range (R. 101, 129-130, 141). Those facts are undisputed. In such circumstances, the use of a customary method, prescribed by law, to rid this range of abandoned horses cannot be rendered illegal or wrongful by a finding that enforcement of the law was a subterfuge to drive petitioners from the area.[5] There is no evidence or finding which refutes the eminently reasonable basis presented by conditions on this range for enforcement of the statute. The presumption of regularity of the official acts of three agencies of two governments cannot properly be set aside and the acts rendered tortious where such reason exists and where failure to act would have been dereliction of duty. Moreover, an attempt to support the judgment under the Federal Tort Claims Act on a theory of malicious enforcement of a regulatory statute is fruitless because of the exclusion from that Act of claims arising

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[5] From the very commencement of the trial the district court held and expressed this conviction (R. 98).

out of "malicious prosecution, abuse of process", etc. 28 U.S.C. 2680(h).

The active participation of federal range employees (who sought the program), along with local sheriffs and livestock operators, does not defeat the validity of the enforcement as not being "by state officers" (Pet. 14). Also, it is not disputed that the members of the Board of Commissioners of San Juan County, authorized by the statute to cause its enforcement, approved the program and this method of enforcement from the beginning (R. 91, 101, 152-157, 349-381). A question as to the date of a formal resolution is immaterial. The Board paid for the timely publication of the notices and, under any view as to the date of their resolution, ratified the program by formal resolution before the round-up (R. 33-34, 91, 153-155, 350-351). All that the statute requires is that the Board "may provide for the elimination of abandoned horses" by causing "notice to be published * * * and * * * posted * * *" thirty days before beginning the elimination (Pet. App. 22).

Similarly unavailing is petitioners' charge of a denial of due process in the lack of adequate notice (Pet. 14-16). Notice was published and posted for a period longer than that required by the statute (R. 32, 85). Petitioners assert that the notice provided by the statute, being in the English language, was neither reasonable nor adequate. But the evidence shows that all prior programs had been noticed in English with the result that most horses of Indians promptly disappeared

from the range and such was the case this time (R. 85, 116, 140-141, 329-332). The horses were gathered from the range gradually over a period of six months (R. 8, 31, 85, 93-94). Petitioners watched many of them being "trucked past the trading post" (R. 266-267). Moreover, in addition to the written notices, the undisputed testimony of the Assistant Range Manager is that "in August and September of 1952, I went down there pretty near continuously in those months, telling the Indians and traders that there was going to be a horse round-up * * * I have been to Sakezzie's camp several times and told them * * *. Told Jim Hatahley" (R. 140). As a result, most of the horses were removed (R. 141). Petitioners do not suggest what other kind of notice could have been given. Certainly the Indians are not exempt from the rules and regulations governing the conduct of citizens with reference to federal property.

There was no discrimination against petitioners nor denial of equal protection of the laws (Pet. 16-17). The fact that only a few horses belonging to white owners were gathered may be explained by the smaller number of such horses loose on the range or by obedience to the notices of the round-up. Petitioners made no attempt to follow the redemption provisions of the statute (Pet. App. 23-24, 34). The assertions of discrimination, in that five horses were returned to white owners while "none of petitioners was given any real opportunity to redeem his animals" and that the fees required by the statute to be assessed for redemption were less

to white owners, are made without any recognition of differences in compliance with the procedures of the statute or of differences in "the expense of caring for the [horses] from the date of capture". Moreover, the horses of several Indians were returned to them (R. 94, 150, 296).

The case presents no important federal question. No justiciable question is presented by petitioners' challenge of the "validity and wisdom" of a decision by the Interior Department in the handling of its affairs as guardian of Indians and as administrator of the federal range where, petitioners conceive, there is a conflict of such interests (Pet. 8-9). That is a matter of administrative discretion of the highest order which is not subject to court review, both as a matter of general law (*Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324-325; *Louisiana* v. *McAdoo*, 234 U.S. 627, 633), and as a matter specifically excluded from the Federal Tort Claims Act, 28 U.S.C. 2680(a).

Moreover, there is not the conflict of interests which petitioners urge. Petitioners stand on their assertion of a legal right, based on "ancestral" occupancy, to live on and use this area of the public domain adjacent to the Navajo Indian Reservation.[6] But against this position are the facts (a) that the Navajo Reservation was established by Treaty of June 1, 1868, 15 Stat. 667, as the "permanent home" for "the whole people of said na-

[6] They concede that the area involved is "federal range" and "public domain" (Pet. 2, 14).

tion or tribe" and by which the Navajos agreed to "relinquish all right to occupy any territory outside their reservation"; (b) that Congress enlarged the reservation along its northern boundary up to, but excluding, the area here in dispute by Act of March 1, 1933, 47 Stat. 1418; and (c) that Navajo Indians, including some of petitioners, have been enjoined from using the area by decision in *Young* v. *Eelorm*, 244 P. 2d 862 (Utah Sup. Ct., May 21, 1952), certiorari denied, 344 U.S. 886 (November 17, 1952), which, upon a full consideration of the question, held that Navajo Indians have no rights in the area. The United States has always asserted exclusive title to this area since the Treaty of 1868.[7] Thus the Department of the Interior acted in conformity with treaty, statute and court decision. It lacked power to enlarge the reservation. Rather than abusing its responsibilities in declining to extend the Navajo domain beyond that given by Congress (Pet. 9), the Department of the Interior reasonably refused to enlarge the reservation by indirect means.

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[7] That title is not open to adjudication in this tort action. Moreover, the claim of petitioners based on original Indian title (see *United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C.A. 10)) was resolved against them when this Court held that original Indian title is not a compensable property interest as against the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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